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Supreme Court of the United States

October Term, 1946
No. 1469

FRANK W. FORD, as Trustee in bankruptcy of Harlem Garment Center, Inc., bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your petitioner, Frank W. Ford, as Trustee in bankruptcy of Harlem Garment Center, Inc., bankrupt, respectfully applies for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered February 28, 1947 (R. 218), reversing an order of the United States District Court for the Southern District of New York (R. 203), which had affirmed an order of the Referee in bankruptcy granting a turnover motion against an officer of the bank-

rupt (R. 190-193). Petition for rehearing was denied on March 13, 1947 (R. 224-225). A certified copy of the record, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, paragraph 1, of the Rules of this Court.

Opinions Below

The opinion of the Referee is at R. 180-189. The opinion of the District Court is at R. 202. The opinion of the Circuit Court of Appeals is at R. 213-217. None of the opinions are as yet reported, except the Circuit Court opinion, which is reported at 160 F. (2) 457.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347(a)) and Tit. 11, Sec. 47c U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 854.

Questions Presented

(1) On a turnover motion against an officer of a bankrupt, where the Referee in bankruptcy in granting the motion (affirmed by the District Court) *found as a fact, with most abundant support in the record, that respondent's story is unbelievable and a concoction,* has not petitioner established that respondent's claim to be an adverse claimant "is so unsubstantial and obviously insufficient, either in fact or in law, as to be plainly without color of merit,

and a mere pretense",* thus requiring the Circuit Court of Appeals to affirm the order of the District Court?

(2) May the Circuit Court of Appeals ignore Rule 52(a) F. R. C. P., and disregard the findings of fact of the Referee who has granted a turnover motion against an officer of a bankrupt (affirmed by the District Court), where the Referee, who has seen and observed respondent testify falsely throughout, and heard him give four contradictory versions of the material facts, has found as a fact, with most abundant support in the record, that respondent's claim to be an adverse claimant was unbelievable and a concoction?

(3) Is it the viewpoint of the Supreme Court (the question has never been before it) that a Referee in bankruptcy has no power to grant a turnover motion against an officer of a bankrupt, but must accept as true for the purpose of denying the motion, respondent's utterly unbelievable story, found by the Referee to be a concoction, because one of respondent's four contradictory versions, *if believed,* would make him an adverse claimant?

(4) The Circuit Court herein has held that a Referee in bankruptcy has no power to grant a turnover motion against an officer of a bankrupt, but must accept as true for the purpose of denying the motion, respondent's utterly unbelievable story, found by the Referee to be a concoction, because one of respondent's four contradictory versions, *if believed,* would make him an adverse claimant. The Circuit Courts of Appeals for the Third, Seventh and

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* *Harrison* v. *Chamberlin,* 271 U. S. 191, 195.

Eighth Circuits, in granting such motions, have held to a much more liberal and realistic viewpoint.* **Is the Second Circuit correct or are the Third, Seventh and Eighth Circuits correct?**

Statutes and Rules Involved

Tit. 11, Sec. 11a(7) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 842 (Sec. 2a(7) of the Bankruptcy Act) gives Courts of Bankruptcy jurisdiction to cause the estates of bankrupts to be collected and to determine controversies in relation thereto except as otherwise provided in the Act.

Tit. 11, Sec. 11a(15) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 842 (Sec. 2a(15) of the Bankruptcy Act) provides that the said Courts may make such orders, issue such process, and enter such judgments, as may be necessary for the enforcement of the provisions of the Act.

Tit. 11, Sec. 66(6) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 857 (Sec. 38(6) of the Bankruptcy Act) invests Referees with jurisdiction to perform such of the duties as are conferred on Courts of Bankruptcy, except as otherwise provided in the Act.

Tit. 11, Sec. 75(a)(1) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 860 (Sec. 47a(1) of the Bank-

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* *Rabinowitz* v. *Oughton* (C. C. A. 3rd) 92 F. (2) 297; cert. den. 303 U. S. 649; *Re Kansas City Journal-Post Co.* (C. C. A. 8th) 144 F. (2) 819; cert. dis. 323 U. S. 807; *Re Dayton Hotel Co.* (C. C. A. 7th) against former attorney for the debtor, 110 F. (2) 459; cert. den. 310 U. S. 641; *Re Gallis* (C. C. A. 7th) against bankrupt partner's father, 115 F. (2) 626; cert. den. 312 U. S. 704.

ruptcy Act) directs trustees to collect and reduce to money the property of the estates for which they are trustees, under the direction of the Court.

Rule 52(a) of the Federal Rules of Civil Procedure provides, *inter alia*, that findings of fact shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses.

Statement

The Receiver in bankruptcy (succeeded by the Trustee) moved before the Referee for an order directing Graham Magee, treasurer and a director of the bankrupt, to turn over the proceeds of a $5,000.00 check (R. 6, Trustee's Exs. 4A-4B, R. 163, 114) which had been paid to him as treasurer of the bankrupt, and which he admittedly diverted to his own personal bank account (R. 14). The check had been issued by William E. Leahy for corporate stock of the bankrupt (R. 165, 149, 156-157).

The Referee granted the motion (R. 180-193). The District Court affirmed the Referee's order (R. 202-203). The Circuit Court of Appeals reversed and denied the motion (R. 218), and denied the trustee's petition for rehearing (R. 224-225). The trustee now petitions this Court for a writ of certiorari.

The bankrupt was a New York corporation. Golenbock was president, Keelan was vice-president and secretary, Magee was treasurer. Magee, Golenbock and Keelan comprised the board of directors. Silverman, who was neither stockholder, officer nor director, was production manager (Trustee's Ex. 1, R. 162, 19). Casey, who figures in the

testimony, had no connection whatsoever with the bankrupt, being merely a friend of the various persons.

On August 8, 1945 Leahy sent Magee a letter (Trustee's Ex. 9, R. 165, 144) accompanied by a check for $5,000.00 payable to "Graham Magee, Treasurer" (Trustee's Exs. 4A-4B, R. 6, 163, 114) in payment for corporate stock of the bankrupt previously allotted to Leahy (R. 149, 156, 127-128). When Magee received the check he deposited it in his personal bank account (R. 14) to repay himself for an advance he had previously made to the bankrupt at the request of Casey in the sum of $5,128.42 (Respdt.'s Ex. 1, R. 166, 68).

The by-laws of the bankrupt provided that "the affairs and business of this Corporation shall be managed by a Board of Directors composed of 3 members" who "shall in all cases act as a Board regularly convened, by a majority • • •" (Trustee's Ex. 1, R. 162, 19). There is nothing in the minute book of the bankrupt authorizing the treasurer to deposit in his personal bank account monies received in payment for stock.

It is undisputed that the Board of Directors never authorized Magee to take for himself this $5,000.00 check intended for the bankrupt, and Magee's counsel admitted that no such resolution of the Board of Directors was ever adopted (R. 78). Nor is there any resolution of the Board of Directors granting Silverman *carte blanche* which the Circuit Court had found him to possess (R. 214-216).

It is petitioner's contention that the *incredible,* unsupported testimony of Magee conclusively established that he had pocketed the $5,000.00 without right or authority; and that his possession therefore *continued to be constructively the possession of the bankrupt.*

It may well be assumed that Magee, an attorney for over 20 years, with an income of $45,000.00 a year from other endeavors (R. 13-14), knew exactly what he was doing at all times.

Let us briefly analyze the highlights of his testimony.

The 'I Don't Know' Version

His First Version: Magee admitted that on January 4, 1946, prior to the institution of the turnover motion, he had testified in 21a proceedings that he had received the $5,000.00 check from Leahy in payment of Leahy's stock subscription, which check had been sent to him because he was treasurer; that Leahy had sent him no other check in that amount; and that he (Magee) had turned the check over to Jacobs, a minor officer, for deposit in the corporate account (R. 34-43); and that when he (Magee) had been asked as to whether he had been repaid his prior advance of $5,128.42, and by whom, that he had answered (R. 45):

> "Well, I imagine it would have been a check of Harlem Garment. I am only guessing. *They may never have paid me back, I don't know, to tell you the truth.*"

In this version we have a man who diverted to himself $5,000.00 in August, 1945, testifying less than five months thereafter that he did not know whether he had been repaid, when in fact he had pocketed the very check which he swore he had turned over to Jacobs. His purported uncertainty in this version concerning the repayment of his advance was obviously quite calculated and based upon a strong sense of guilt.

The Casey Version

His Second Version: Magee admitted that on March 6, 1946, the day he was served with the turnover motion, he asked for permission to correct his prior testimony, and testified before Referee Ehrhorn (presiding in the absence of Referee Kurtz) in 21a proceedings (R. 50-51). This version was to the effect that the $5,000.00 check from Leahy was not for stock in the corporation (R. 50-51, 29), but that the bankrupt needed money for payroll, and that he (Magee) had called up Casey (who was neither an officer, stockholder, director nor employee of the bankrupt) in Washington, and that *Casey* had told him "You go ahead and advance the money for payroll and I will get Mr. Leahy to send you a check for $5,000.00 to reimburse you" (R. 51, 29-30); and that thereupon he (Magee) advanced the money for payroll and was later reimbursed by Leahy with the $5,000.00 check (R. 50-51, 29-30, 58-60, 69).

The Circuit Court of Appeals agrees that Magee's denials that Leahy's check was for corporate stock, were "patent, even childish, concoctions, which the referee was right to disregard" (R. 214), and that in that connection "Magee showed himself utterly untrustworthy" (R. 217).

It is to be particularly noted that Referee Ehrhorn at the time specifically asked Magee *"Does that complete your correcting statement"? and Magee answered "Yes, sir"* (R. 51).

There is not a word in this correcting testimony about Silverman authorizing Magee to reimburse himself out of the Leahy money.

The One Line Version

HIS THIRD VERSION: In this version Magee embellished upon the second version, testifying (R. 72):

> "Q. When you talked to Mr. Casey did you speak to Mr. Silverman and tell him you talked to Mr. Casey? A. Yes, I did.
>
> Q. Did you tell him what Casey said? A. Yes, I did.
>
> Q. Did you have a talk with Mr. Silverman about that? A. Yes.
>
> Q. Did he say anything about that Leahy check? A. *He said, 'you can credit it against your loan.'* "

The last answer above is the only evidence in the entire record, 179 pages of testimony and exhibits, that Silverman (either on his own behalf or as agent of the bankrupt) authorized Magee to divert the $5,000.00 check into his own pocket.

The Circuit Court of Appeals has based its reversal upon this one line of *incredible* testimony (R. 214-217). It is incredible and not to be given any weight for any one of eight reasons:

(1) *It was not mentioned in his second* (nor in the first, R. 34-45) *version,* although the Referee had specifically asked "Does that complete your correcting statement?" (R. 51).

(2) If the second version (R. 50-51, 29-30, 58-60, 69) was the truth, why should Silverman as a representative of the bankrupt or in any other capacity be telling Magee what to do with the money? *Casey* had asked Magee to advance it. *Casey* had promised that it would be repaid. The money

coming from Leahy was to keep the promise made by *Casey*, and most certainly, according to that version, was not corporate funds, but was intended for Magee personally, and therefore no concern of the bankrupt or Silverman.

(3) Magee had sworn that he did not receive that check as an officer of the corporation, but in his individual capacity (R. 15). Why then should Silverman acting for the corporation have found it necessary to consent to the diversion of the money, if it was not corporate funds?

(4) If the conversation between Silverman and Magee had taken place, Silverman could only have been speaking on his own behalf and *not* on behalf of the corporation, *if the fourth version* [to be dealt with shortly] was the truth.

(5) Even if it be assumed that Silverman did make the statement and that he was presuming to speak on behalf of the bankrupt, the proof established that the Board of Directors never authorized Silverman to represent the bankrupt in that connection (Trustee's Ex. 1, R. 162, 19).

(6) Magee's entire testimony from beginning to end (R. 13-87, 130-133) had rendered him completely unworthy of belief.

(7) Magee did not produce Silverman to corroborate the statement and offered no reason for his failure to produce him, since the statement undoubtedly was never made by Silverman.

(8) Magee himself contradicted the statement, both prior thereto (first and second versions), and thereafter (fourth version).

The Circuit Court has held nevertheless that this unsupported one line assertion by Magee (obviously incredible and entitled to no weight whatsoever) deprived the Court of power to grant the motion!

The—Silverman Personal—Not Harlem—Version

His Fourth Version: Still later in his testimony Magee gave a fourth version (R. 76), testifying:

> "Q. He (Leahy) was not making you a gift of $5000, was he? A. He certainly was not to my knowledge. He was paying back the money I advanced for his account.
>
> Q. *At the request of Harlem Garment Co.?* A. *No;* at the request of Mr. Silverman and Mr. Casey.
>
> Q. Who was Mr. Leahy to look to to get back his $5000? A. I don't know.
>
> Mr. Tacker: I object to that, your Honor.
>
> The Referee: I think that is a fair question under the facts in this case where this witness has testified in relation to this transaction in two absolute diametrical fashions. Objections overruled.
>
> A. (continuing) The only thought I would have in the matter was that Leahy was a friend of Silverman and that *Silverman would expect to borrow money from Leahy.*"

In other words, in this version the obligation was definitely not that of the bankrupt, but of Silverman personally.

If this version was the truth, then Silverman's alleged statement that "you can credit it against your loan" (R. 72) upon which the Circuit Court saw fit to reverse, *could only have been made by him in his individual capacity and*

not as a representative of the bankrupt, since Silverman borrowed the money on his own behalf.

It is most respectfully submitted that upon the record herein there is no basis for determining (1) that Silverman ever made such statement, (2) that the statement, if made, was made by Silverman *as a representative of the bankrupt,* or (3) *that it is entitled to any weight.*

It follows therefore that the Circuit Court was in error in reversing the lower Courts upon the alleged statement of Silverman which, even if deemed to have been made, was entitled to no weight in fact or in law.

The Referee seeing and observing Magee make most unbelievable statements throught his entire testimony (R. 13-87, 130-133), both as above outlined and in a multitude of other respects with which we shall not now burden this Court, had no alternative but to declare as he did that respondent's story was a concoction (R. 188) and to grant the motion.

With due respect to the Circuit Court of Appeals we respectfully assert that it did not have the right in the circumstances, to reverse the Referee's order; and that in doing so it committed serious error, enunciating a theory of law which is not followed by other circuits (Re Kansas City Journal-Post Co, C. C. A. 8th, 144 Fed. 2nd 819; cert. dis. 323 U S. 807; Rabinovitz v. Oughton C. C. A. 3rd, 92 Fed. 2nd 297; cert. den. 303 U. S. 649; Re Dayton Hotel Co., C. C. A. 7th, 110 Fed. 2nd 459; cert. den. 310 U. S. 647; Re Gallis, C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704); nor in accord with the rulings of this Court (Harrison v. Chamberlain, 271 U. S. 191, 195; May v. Henderson, 268 U. S. 111, 116, 118-119.

In *Rabinovitz* v. *Oughton,* 92 F. (2d) 297; supra (C. C. A. 3rd), the trustee moved for an order directing that

Rabinovitz, an officer of the bankrupt, turn over certain monies unlawfully obtained by him from the bankrupt. The record (R. 14-21, transcript of record) discloses a defense which, *if believed,* would make respondent an adverse claimant. The Referee found the story unbelievable and granted the motion, holding that respondent's conduct "savored of a premeditated plot to dissipate and loot the bankrupt estate" and that he was "not always frank and responsive, but often contradictory." The District Judge stated "I find as a fact that there was a deliberate plot on their part to dissipate its assets for their own purposes" (p. 298, C. C. A. opinion). The Circuit Court held that "The referee and the District Court found that the appellant's claim was not adverse. *This finding is amply sustained by the evidence and is binding on us"* (p. 299, C. C. A. opinion, italics ours). This Court refused to grant a writ of certiorari (303 U. S. 649).

In *Re Kansas City Journal-Post Co.,* 144 F. (2d) 819, *supra* (C. C. A. 8th), the trustee moved for an order directing that Newman, an officer of the bankrupt, turn over $75,900 unlawfully obtained by him from the bankrupt. The facts in that case were quite similar to our facts, namely, the officer had diverted to his own purposes, without authority from the Board of Directors, monies which had come into his possession as such officer. The record (R. 35-41, transcript of record) discloses a defense which, *if believed,* would make respondent an adverse claimant. The Referee found his story to be without basis and granted the motion, holding that Newman was withholding the funds "without the slightest color of title" (p. 820, C. C. A. opinion). The District Court reversed "for want of jurisdiction in the referee to make the order in a summary pro-

ceeding" (p. 820, C. C. A. opinion). The Circuit Court reversed the District Court and reinstated the order of the Referee, holding that Newman's contention that he was an adverse claimant did not present " *'some fair doubt and reasonable room for controversy'* " (italics ours). Petition for certiorari was dismissed (323 U. S. 807).

Of particular note is the strongly worded statement of the Circuit Court therein (pp. 822-823, C. C. A. opinion) as to Newman's misconduct in diverting for his own purposes, without authority from the Board of Directors, funds which had come into his hands as officer of the bankrupt. That Court concluded (p. 823, C. C. A. opinion) with comment which is apropos herein—

> "Except for the fact that Newman was president of the corporation, he would not have been able to have gotten his hands upon the funds. Placing his hands upon them for the purpose which he did was a clear legal abuse of the functions of his office. He cannot assert that he had any colorable right against the corporation, by this abuse of his office, to take the law and the money into his own hands for the purpose of personally adjusting or protecting himself in any grievance he might have had against General Properties. The money legally belonged in the treasury of the corporation, still belongs there, and the trustee is entitled to have it restored."

In *re Dayton Hotel Co.*, 110 F. (2d) 459, supra (C. C. A. 7th), the trustee of the debtor moved for an order directing that Richter, former attorney for the debtor, turn over certain monies unlawfully retained by him. The record (R. 4-6, transcript of record) discloses a defense, which, *if believed,* would make respondent an adverse claimant. Richter, having lost below, insisted before the Circuit Court

that "it was the duty of the court, upon the filing of appellant's response, to determine whether appellant was wrongfully withholding money from the trustee without having any real interest in it, or whether there was a real controversy requiring a plenary suit; whether his claim was bona fide, or merely colorable" (p. 460, C. C. A. opinion). The Circuit Court declared that to be a fair statement of the Court's duties and held that the Court had complied with these requirements and that "appellant was wrongfully withholding the money in question; that his claim was not bona fide and that it did not tender a real controversy requiring a plenary suit" and that "on the merits the record is quite convincing that the court's findings were supported by *substantial evidence*" (p. 460, C. C. A. opinion, italics our). This Court refused to grant a writ of certiorari (310 U. S. 647).

In *Re Gallis,* 115 F. (2d) 626, *supra* (C. C. A. 7th), the trustee moved for an order directing that the father of one of the bankrupts turn over certain money unlawfully received by him from the bankrupts. Respondent contended (R. 7-8, transcript of record) that the money represented the lawful repayment of a debt, which would obviously make him an adverse claimant, *if believed.* The Referee granted the motion, giving no credence to the story. The District Court affirmed. The Circuit Court affirmed, holding (p. 627, C. C. A. opinion) **"The referee saw the witnesses and heard their stories at length. He was in a much better position than we, to pass on their credibility and the case is one which turns on credibility. His deliberate judgment is entitled to great weight. We must and do accept it. It is also clear that if his first finding (that respondent was not a creditor) is accepted, he was justified in concluding that appellant's adverse claimant status was not real and**

substantial, but merely colorable. The referee was therefore justified in acting in this summary proceeding. May v. Henderson, 268 U. S. 111; Harrison v. Chamberlin, 271 U. S. 191" (emphasis ours). This Court refused to grant a writ of certiorari (312 U. S. 704).

It is crystal clear that if the Third, Seventh and Eighth Circuits are correct in their decisions above, that the Second Circuit herein is in error on the law.

In the latest authoritative expression of the Supreme Court on the subject (Harrison v. *Chamberlin,* 271 U. S. 191, 195), *it was stated that a claim was to be held colorable if "the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense."*

That is just what the Referee found Magee's claim to be. The record abundantly supports the Referee's determination. The District Court affirmed. When the Circuit Court reversed, we state with due respect that it was not following the law laid down by this Court in Harrison v. *Chamberlin* (*supra*).

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that the Referee was in error in granting the turnover motion.

(2) In holding that the Referee was bound to determine that respondent was an adverse claimant because of a statement made by respondent which was in fact incredible and so found by the Referee (R. 188), and in any event entitled to no weight in fact or in law.

(3) In holding that petitioner had not established that respondent's contention "is so unsubstantial and obviously insufficient, either in fact or in law, as to be plainly without color of merit, and a mere pretense" (*Harrison* v. *Chamberlin,* 271 U. S. 191, 195).

(4) In failing to give "due regard • • • to the opportunity of the trial court to judge of the credibility of the witnesses" (Rule 52a F. R. C. P.), and in disregarding the Referee's finding, abundantly supported by the record, that "the story now told by the respondent was concocted by him" (R. 188).

(5) In holding that Silverman could be granted power to authorize respondent to divert the monies, by other than action of the Board of Directors duly convened.

(6) In holding without support in the record that Silverman had received power from the Board of Directors to authorize respondent to divert the monies.

(7) In holding that there was credible evidence that Silverman authorized respondent to divert the monies to his own use.

(8) In holding without credible evidence in support thereof that the statement "you can credit it against your loan" (R. 72) allegedly made by Silverman, was made as a representative of the bankrupt, when Magee's fourth version (R. 76) establishes that the statement could only have been made by Silverman *in his individual capacity and not as a representative of the bankrupt.*

(9) In holding (R. 214-216) without support in the record that the bankrupt owed Magee the $5,128.42 advanced

by Magee, when Magee's second, third and *fourth* (R. 76) versions establish that the advance was not made at the instance or request of the bankrupt.

(10) In holding that the bald, unsupported, one line statement of respondent that Silverman told him "you can credit it against your loan" was sufficient to deprive the Referee of power to grant the motion (R. 214-217), disregarding the fact that the statement was *unbelievable*, that respondent told three additional, contradictory versions, both before (first version, R. 34-35; second version, R. 50-51, 29-30, 58-60, 69) and after (fourth version, R. 76), and that his entire testimony was replete with falsehoods (R. 13-87, 130-133), requiring the Referee to determine that his story was a concoction (R. 188).

(11) In holding that respondent was to be dealt with as "a third person" (R. 215) rather than as an officer and director of the bankrupt.

(12) **In limiting in effect the power of a Referee to grant a turnover motion to such case only in which the respondent confesses his wrong and fails to repudiate the confession.**

(13) **In holding, with an overhanging threat of the denial of allowances (R. 217), that it is not a trustee's duty to, nor is he to, institute a turnover motion except "in the plainest cases" (R. 217).**

(14) In holding (where the record clearly establishes, and the Referee found, and was affirmed by the District Court, that respondent had not told the truth and that his story was a concoction) that the trustee had not "made out a plain enough case" (R. 213, 217).

(15) **In so limiting the power of a Referee to grant a turnover motion as to cripple seriously creditors in their pursuit of monies of a bankrupt estate unlawfully diverted by officers and directors of the bankrupt.**

(16) In misinterpreting and misapplying the applicable decisions of this Court (*Harrison* v. *Chamberlin,* 271 U. S. 191, 195; *May* v. *Henderson,* 268 U. S. 111, 116, 118-119) on the question as to the nature and character of the evidence required to be produced by an officer and director of a bankrupt **in order to be held to be an adverse claimant.**

(17) In rendering a decision in conflict with decisions of other Circuit Courts on the same matter, namely, the nature and character of the evidence necessary on a turnover motion against an officer and director of a bankrupt. (*Rabinovitz* v. *Oughton,* C. C. A. 3rd, 92 Fed. 2nd 297; cert. den. 303 U. S. 649; *Re Kansas City Journal-Post Co.,* C. C. A. 8th, 144 Fed. 2nd 819; cert. dismissed 323 U. S. 807; *Re Dayton Hotel Co.,* C. C. A. 7th, 110 Fed. 2nd 459; cert. den. 310 U. S. 647; *Re Gallis,* C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704.)

(18) **In rendering a decision in conflict with decisions of other Circuit Courts on the same matter, namely, the question of giving due regard to the opportunity of the Referee to judge of the credibility of the witnesses, and the disregarding of the Referee's findings, amply supported by the record, and the ignoring of Rule 52 (a) F. R. C. P.** (*Re Gallis,* C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704; *Rabinovitz* v. *Oughton,* C. C. A. 3rd, 92 Fed. 2nd 297; cert. den. 303 U. S. 649.)

Reasons for Granting the Writ

The Referee saw and heard respondent (treasurer and director of the bankrupt) testify. His entire testimony was incredible (R. 13-87, 130-133). He gave four contradictory stories on the material issue (pp. 7-12, *supra*). The Referee found as a fact with full support in the record that respondent's story was a concoction (R. 188) and granted the turnover motion (R. 190-193), which was affirmed by the District Court (R. 202-203).

The Circuit Court of Appeals for the Second Circuit (though holding that respondent's story in part was "patent, even childish, concoctions, which the Referee was right to disregard" R. 214, and that in that connection "Magee showed himself utterly untrustworthy" (R. 217) reversed and denied the motion, holding that respondent's *incredible* statement (found by the Referee to be a concoction, R. 188) that Silverman told him "you can credit it against your loan" (R. 72) made respondent an adverse claimant (in disregard of the fact that in no event was the statement entitled to any weight).

It is respectfully submitted that in so deciding—

(1) The Circuit Court for the Second Circuit has misinterpreted and misconstrued, and its decision is in conflict with, the applicable decisions of this Court (*Harrison* v. *Chamberlin*, 271 U. S. 191, 195; *May* v. *Henderson*, 268 U. S. 111, 116, 118-119).

(2) **The Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with decisions of other Circuit Courts on the same matter, namely, the nature and character of the evidence necessary on a turnover motion against an officer and director of a bankrupt** (*Rabinovitz* v. *Oughton*, C. C. A. 3rd, 92 Fed. 2nd 297; cert. den.

303 U. S. 649; *Re Kansas City Journal-Post Co.*, C. C. A. 8th, 144 Fed. 2nd 819; cert. dismissed 323 U. S. 807; against former attorney for the debtor, *Re Dayton Hotel Co.*, C. C. A. 7th, 110 Fed. 2nd 459; cert. den. 310 U. S. 647; against a bankrupt partner's father, *Re Gallis*, C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704).

(3) The Circuit Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(4) **The Circuit Court of Appeals for the Second Circuit has sharply and unreasonably reduced the nature and character of the evidence necessary to sustain the position of an alleged adverse claimant, which question has not been, but should be settled by this Court.**

(5) **The Circuit Court of Appeals for the Second Circuit has so limited the powers of a Referee, that a turnover motion against an officer and director of a bankrupt may be granted only, it would seem, in such instances where the officer has confessed his wrong doing, and has not repudiated the confession. This will seriously cripple creditor bodies in bankruptcies in their pursuit of funds belonging to the estate, and presents a question of sufficient public importance for this Court to decide authoritatively.**

The Circuit Court of Appeals for the Second Circuit has failed to give due regard to the opportunity of the Referee to judge of the credibility of respondent, and has disregarded the Referee's findings, abundantly supported by the record, ignoring Rule 52a F. R. C. P. In so doing—

(6) **The Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other Circuit Courts on the same matter** (*Re Gallis,*

C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704; *Rabinovitz* v. *Oughton,* C. C. A. 3rd, 92 Fed. 2nd 297; cert. den. 303 U. S. 649).

(7) The Circuit Court of Appeals for the Second Circuit has decided a question which as it relates to turnover proceedings has not been, but should be, settled by this Court.

(8) Despite a record which abundantly supports the determination of the Referee in granting the motion (affirmed by the District Court), the Circuit Court of Appeals for the Second Circuit has held that this is not one of the "plainest cases"; and further, that a trustee in bankruptcy may not, under penalty of being deprived of allowances, institute a turnover motion "except in the plainest cases" (R. 217). The Circuit Court of Appeals for the Second Circuit in so ruling has decided a question which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

I. Jonas Speciner,
Attorney for Petitioner.

Julius M. Arnstein,
Of Counsel.

June 2nd, 1947.

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1469 119

FRANK W. FORD, as Trustee in bankruptcy of HARLEM GARMENT CENTER, INC., Bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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July 9th, 1947.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349

Supreme Court of the United States

October Term, 1946

No. 1469

FRANK W. FORD, as Trustee in bankruptcy of HARLEM GARMENT CENTER, INC., Bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent argues (p. 6) that the test of an adverse claimant is whether he has presented "an arguable hypothesis as question of fact or of law." This is obviously not the test applied by *Harrison* v. *Chamberlin,* 271 U. S. 191, 195. It is, however, the test applied by the 2nd Circuit herein.

Respondent's contention (p. 8) that there is no difference between the reasoning of the 2nd Circuit herein and the reasoning of the 3rd, 7th and 8th Circuits in the cases cited in petitioner's main brief (pp. 12-16) is, of course, without basis in fact.

The 3rd, 7th and 8th Circuits have followed the test of *Harrison* v. *Chamberlin* (*supra*), namely– "Is (the claim) so unsubstantial and obviously insufficient either in fact or in law, as to be plainly without color of merit, and a mere pretense"?

The 2nd Circuit herein in its determination has followed its erroneous theory previously set forth in *Re Yorkville Coal Co.* (211 Fed. 619), which was based upon dictum in *Mueller* v. *Nugent*, 184 U. S. 1, 15.

Respondent in dealing with Rule 52(a) F. R. C. P. argues (pp. 7, 9) that the Referee is "not the ultimate trier of the facts". The contention is completely without merit. See Tit. 11, Sec. 11a (7) (15), 66 (6) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 842, 857. (Sec. 2a (7) (15) and 38 (6) of Bankruptcy Act.)

Respondent has overlooked (p. 7, Respdt.'s Brief) in *Re Gallis*, 115 Fed. (2nd) 626, which while not referring to Rule 52(a) F. R. C. P. specifically, deals with the exact situation (pp. 15-16 Pet. Main Brief); and holds that the Referee's determination as to credibility, is to be upheld.

Respondent cites *Kansas City Journal-Post Co.* (*Boston* v. *Schapiro*), 144 Fed. 2nd, 812. In that case respondent with corroborating testimony in support of his claim had quite properly established himself as an adverse claimant. In the instant case Magee's one-line statement on the material issue was not only uncorroborated, but also was incredible (pp. 9-11 Pet. Main Brief).

Petitioner has not previously discussed *Cline* v. *Kaplan* (323 U. S. 97), referred to by respondent (p. 13, Respdt.'s Brief), as the applicable statements therein are dicta. The

question for determination therein was– Had the claimant made timely objection to the jurisdiction of the Court or had it been waived? But whether dicta or not, nothing in *Cline* v. *Kaplan* in any wise overrides *Harrison* v. *Chamberlin* (*supra*).

There are numerous statements in respondent's brief not supported by the record, the more flagrant being:— that Magee was nominal treasurer (p. 1); that Silverman was virtual owner (p. 2); that the Referee had prejudged the issue (p. 3); that Magee was corroborated by Golenbock and Casey in his claim that he would not make the advance unless and until he had received the promise of the Leahy check as reimbursement (p.9); that Magee did not have to endorse the corporate name because the check was not made out to the corporation (p. 3). To refute the implications contained in respondent's attempt to establish (pp. 4-6) that he was confused when first examined, would extend this reply brief unduly.

Conclusion

For the reasons heretofore set forth, it is respectfully submitted that the petition for writ of certiorari should be granted.

I. Jonas Speciner,
Attorney for Petitioner.

Julius M. Arnstein,
of Counsel.

July 9th, 1947.

JUN 30 1947
CHARLES ELMORE GROPLEY

Supreme Court of the United States

October Term, 1946
No. 119

FRANK W. FORD, as Trustee in Bankrutcy of HARLEM GARMENT CENTER, INC., Bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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Supreme Court of the United States

October Term, 1946

No. 1469

FRANK W. FORD, as Trustee in Bankruptcy of HARLEM GARMENT CENTER, INC., Bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Absent from the Petition a consistent marshalling of the facts sufficient to frame the issue involved, Respondent presents below a summary factual statement.

The Undisputed and Uncontradicted Facts

(1) Graham Magee, the respondent, was the nominal Treasurer (and only nominally the Treasurer) of the bankrupt corporation (R. 52, 53, 65, 124): he had invested $6,250 in the corporation (R. 79) on the recommendation of his friend Joseph Casey (of Washington) who brought him in (R. 123) as the result of a request made by one William E. Leahy (also of Washington) who (R. 126) had been for many years a friend of one

(2) Silverman (Joseph) who, although he held no office in the bankrupt corporation, was its virtual owner (R. 107, 109), conducted its operations in all its various phases, was its day-by-day manager (R. 107, 108, 110, 112) and had the job of raising money for payroll as one of his duties (R. 111), had invested more than $50,000 in the corporation (R. 83, 109), but did not hold office in the corporation because he did not want his name officially connected with the corporation by reason of previous tax difficulties (R. 107, 108, 123).

(3) Magee had been associated with the bankrupt corporation hardly three weeks (he made his investment in July 1945—R. 26) when Silverman requested him (during the latter part of July or the early part of August, 1945) to advance money for payroll (Magee's testimony R. 60, 69, 78,—Golenbock's testimony R. 99, 102, 106): Magee refused to make the advance and called Joseph Casey (who had been the means of bringing him into the corporation) in Washington on the telephone, because Silverman kept pressing him, with the result that Casey promised to contact Leahy (who, through Casey, had got Magee into the corporation) to get Leahy's promise of reimbursement if Magee made the advance (R. 29, 30, 60, 69): Magee reported to Silverman his talks with Casey and Silverman told him he could credit the Leahy check against his payroll loan (R. 72). In the meantime, Silverman had also been talking with Casey (Golenbock's testimony—R. 105), and Leahy's name had figured in these conversations (R. 101).

(5) Casey brought pressure to bear on Leahy to repay Magee for any advance he might make, urging that he was morally bound to see Magee whole because it had been

through him that Magee became associated with the corporation and Leahy agreed (R. 126, 127).

(6) Magee on August 3, 1945, gave his check to the bankrupt corporation for $5128.42 as a payroll advance (R. 43, 50).

(7) Magee received Leahy's check, dated August 8, 1945, for $5,000 and deposited it in his own bank account; it was not necessary for him to endorse the corporation's name, because it was not made out to the corporation (R. 14).

(8) Less than three weeks after receiving the Leahy check Magee, on August 27, 1945, made a new advance of $5,000 to the bankrupt corporation (R. 70) evidenced by Respondent's Exhibit 2 (R. 169).

(9) Golenbock, the President of the bankrupt, testified he knew about the Magee advance on August 3, 1945, had talked with Silverman about an arrangement for reimbursement to Magee—but the Referee refused to allow him to testify to the details of his talks with Silverman regarding the Magee payroll advance and its connection with the Leahy check (R. 99, 103) and as to whether Silverman had spoken to him about a check coming in from Leahy (R. 112).

(10) Virtually, at the commencement of the proceeding, before direct examination of Magee had been finished, before cross-examination, before other witnesses were examined,—the Referee prejudged what he considered to be the important issue in the proceeding,—whether Magee knew Leahy was obligated to pay $500 a share for 10 shares of the bankrupt corporation (R. 49).

The Factual Issue Involved

The Trustee produced no witnesses of his own to make out his case. He relied on such facts as he could force from Magee, making Magee his own witness. He did not produce Silverman to contradict Magee's recital of the facts, or Golenbock's testimony. As rebuttal, he put in evidence the deposition (taken in Washington) of Leahy, as to how Leahy came to send Magee his check for $5,000. Leahy's testimony consisted of "hazy" recollections (R. 142, fol. 424; R. 145, fol. 434; R. 147, fol. 441; R. 148, fol. 442; R. 148, fol. 443; R. 149, fol. 445; R. 150, fol. 449; R. 151, fol. 453; R. 154, fol. 462; R. 156, fol. 468; R. 158, fol. 473).

In order to prove that the Magee claim (that when he advanced $5,128.42 on August 3, 1945, it was arranged he was to be reimbursed by the Leahy check)—was not substantial but merely colorable, the Trustee relied heavily upon the purported contradictory statement made by Magee when he testified during a 21A proceeding that he thought Leahy had paid for stock in the bankrupt corporation in August, 1945, by a check for $5,000—a self-contradiction that did not go to the heart of the Magee claim, for Magee's claim could still be true, and still Leahy might have expected that the corporation would give him stock,—the triangular talks between Magee and Casey, and between Casey and Silverman, and between Magee and Silverman, working out a triangular arrangement, by which Magee would advance payroll, be reimbursed by Leahy, who would be compensated by the corporation by way of stock.

Magee, in explanation of his testimony given at the 21A proceeding, testified (R. 75):

> "* * * when I testified the first time Mr Speciner (the Trustee's attorney) knew quite well that I was not and did not have all of the facts with respect to the moneys that were paid into the corporation or the money I had advanced. As a matter of fact I had not expected to be questioned about the money I advanced. He knew it; he had a bookkeeper here and I had to ask her questions about the moneys which were advanced; he knew I did not recall the facts."

The confusion into which Magee had been thrown when he testified at the 21A proceeding, without warning or being prepared on the facts, is illustrated by a recital of the following statements made by him at that hearing, all of them errors that could not possibly have gained him or anyone else any advantage, if made with a conscious view to lying:

(a) he testified that at a meeting of the directors on July 17, 1945, the resolution of May 24, 1945, had been passed, yet it was perfectly clear this did not happen (R. 23)

(b) he did not know who the directors were—he could only imagine who they were (R. 31)

(c) He stated that the fixed value of a share was $50, although it was really $500 (R. 33), having paid $5,000 for 100 shares himself, he should have known it was $500, not $50,—had he been alert, not confused

(d) he said he deposited the Leahy check in the Amalgamated Bank (the corporation depository) although he had deposited it in his own bank (and it is

obvious he could not possibly gain anything by lying —besides which it was a matter of easy verification) —(R. 38).

(e) he stated he did not remember "when I put up my own money" (showing his mind was hazy at the time)—(R. 38).

Magee, within a day or two, called the Trustee's attorney on the telephone, to say he checked the facts of the Leahy check, and gave him the details (R. 66, 67). The Trustee's attorney, testifying, corroborated this statement (R. 133 et seq.).

Questions Raised By Petitioner

The Petitioner asserts he has four questions to present to this Court for answer:

1. **If a Referee in a turnover proceeding makes a finding "that respondent's story is unbelievable and a concoction"—where there is "abundant support in the record"—is it not established that the adverse claim is without merit?**

The question is not pertinent and ignores the fundamental inquiry in a proceeding of this kind—which is, has a claimant presented an arguable hypothesis as question of fact or of law? If the record shows he has, he makes out a claim that is more than colorable,—and the Circuit Court of Appeals here has decided that Magee's claim is more than colorable.

2. May the Circuit Court of Appeals ignore Rule 52(a) F. R. C. P. and disregard the findings of fact of the Referee?

Where a record discloses an arguable claim, as matter of fact or of law, it does not become a question of whether the Referee believes or does not believe a witness or witnesses—which is a function that only ultimate triers of the facts may assume—while the Referee in bankruptcy, in a proceeding of this kind, is clearly not the ultimate trier of the facts. The question of whether this rule applies was never raised in the Circuit Court, was not passed upon by the Circuit Court in this case, nor was it passed upon by any of the other circuits in any of the cases cited in the Petition.

3. Must a Referee accept as true respondent's "utterly unbelievable story" because one of four contradictory versions, if believed, would make him an adverse claimant?

This is an admission that the claimant has an arguable adverse claim. Not four, but only one version was given by Magee. What the Petitioner has elaborated as varying versions are nothing more than incidental additions or qualifying variants to the main story,—a situation which inheres in any case where a witness is cross-examined at length, and asked to go over his story again and again. If apparent discrepancies appear,—they are "mere jury arguments," as was held by the Circuit Court of Appeals for the 8th Circuit in the *Kansas City Journal-Post* case (see Point II, *Post*).

4. Is the Second Circuit Court of Appeals right—or are the Third, Seventh and Eighth Circuit Courts of Appeals right?

This assumes, without the slightest support, there is divergence in matter of law between the different circuits mentioned. There is no divergence of any kind, and none has been pointed out in Petitioner's brief (See Point II, *Post*).

The Real Points

There are only two questions presented by the Petitioner's Brief—the rest are garnishments,—repetitions intended to give fictitious emphasis to specious argument:

1. Does the record show that Magee's claim is more than colorable?
2. Is there divergence of opinion on a matter of law between the Second Circuit Court of Appeals in the instant case, and on the same matter of law in one of the other cases decided by another Circuit Court?

The Court's warning to Trustees to avoid bringing turnover proceedings where there is no basis for same—is not an issue in this case, and is patently not ground for review here.

POINT I

Respondent showed he had a good adverse claim.

On the proceeding, both the Trustee's attorney and the Referee (who blindly followed the lead of the Trustee) assumed that the most important question in the case was whether Magee lied when he asserted that when Leahy sent him the check, Leahy did not expect to receive stock: this obviously was not the crucial point,—for the true query was—was there more than mere color to the claim of Magee that he would not make the payroll advance unless and until he received the promise to have the Leahy check by way of reimbursement for the loan?—on which claim he was corroborated by Golenbock, the President, and by Casey. This claim by Magee was clearly not incredible on its face—and the Referee had no right to assume the role of ultimate trier of the facts—particularly where the Trustee failed to produce Silverman to contradict Magee.

When Magee received such a promise,—it clearly made no difference whether Leahy expected to receive stock, or anything else, or nothing at all.

POINT II

There is no conflict of decision between this case and any other case in any other circuit.

Petitioner asserts, without support in the petition or the brief, that there is serious conflict between the instant decision and decisions in the Third, Seventh and Eighth Circuits.

> *Rabinovitz* v. *Oughton*, 92 F. (2d) 297—C. C. A. 3 (Petitioner's Brief, Page 12).

There is nothing in the Circuit Court opinion which makes a ruling of law in conflict with any ruling in the opinion of the Circuit Court in the instant case. That being so, there cannot be divergence of opinion. In that case, Rabinovitz, owner of the business, withdrew from the bank account $10,000 within a few days of the bankruptcy, leaving $50 in the bank, and despoiled the company further of large quantities of merchandise, at a time when the books shows the company owed him very little. It was a clear case of despoliation on the verge of bankruptcy with no redeeming features. The Circuit Court affirmed the Referee,—so there was no point of law asserted or rejected,—and consequently no possible divergence of opinion.

> *Re*: *Kansas City Journal-Post*, 144 F. (2) 819—C. C. A. 8 (Petitioner's Brief, Page 13).

In this case, the Circuit Court held that Newman's claim that he had a right to withdraw company funds because of the failure of a creditor to assign over its claim against the

company, was without foundation as matter of law—and it was clear from the record, that all Newman had was an argument that was insufficient as matter of law. It would have been futile to relegate the matter to a plenary suit, for the facts of the case were undisputed, and on those facts, no legal right existed in Newman to withdraw company funds. But the Circuit Court enunciated no principle of law in conflict with the opinion of the Circuit Court in the instant case.

On the other hand, this same court, in the same proceeding, involving a turnover order secured against Newman's partner in the transaction, one Schapiro,—

> *Re*: *Kansas City Journal-Post Co.* (*Bostian* v. *Schapiro*), 144 F. (2d) 812.

the Referee had termed the claim of Schapiro spurious, and had criticized his testimony and that of his attorney as "fictitious" and "beyond belief"—the Circuit Court of Appeals saying of such characterizations that they were "mere jury arguments," and holding that the Referee had no right to ignore the corroborative testimony of Schapiro's attorney.

> *Re*: *Dayton Hotel Co.*, 110 F. (2d) 459—C. C. A. 7 (Petitioner's Brief, Page 14).

In this case, the Circuit Court merely stated that the lower court had complied with the requirement that he must determine whether the adverse claim had more than mere color, and stated "we think there was no error"—that claimant did not tender a real controversy requiring a plenary suit.

Obviously, no principle of law was decided at all different from any principle followed in the instant case. There appears to be no such divergence, and none has been pointed out by Petitioner that has real substance.

> *In Re Gallis,* 115 F. (2d) 626—C. C. A. 7 (Petitioner's Brief, Page 15).

In this case, the Circuit Court affirmed a turnover order, saying merely there was "serious doubt upon the genuineness of appellant's creditor status"—and that it would accept the Referee's findings.

Obviously, all the Court did was merely to affirm a state of facts already found by the Referee,—but in doing so, made no decision, enunciated no principle of law that conflicts with anything to be found in the opinion of the Circuit Court in the instant case,—and consequently there is no divergence, apparent or real.

CONCLUSION

The Circuit Court of Appeals for the Second Circuit did not misinterpret and misapply the applicable decisions of this Court in the cases of *Harrison* v. *Chamberlain*, 271 U. S. 191, and *May* v. *Henderson*, 268 U. S. 111.

The Circuit Court of Appeals in its opinion herein cited the case of *Cline* v. *Kaplan* (323 U. S. 97, 99) wherein this Court confirmed the rule that when "the claim is not colorable nor frivilous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily."

The Petition Should Be Denied

Respectfully submitted,

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